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December 19, 2002

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Verizon Petition for Forbearance from the Prohibition of Sharing Operating Installation and Maintenance Functions Under Section 53.203 (a)(2) of the Commissions Rules, CC Docket No. 96-149; Section 272 (f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112; Verizon Petition for Emergency Declaratory and Other Relief, WC Docket No. 02-202; and Verizon Telephone Companies Tariff FCC Nos. 1, 11, 14 and 16, WC Docket No. 02-317

Dear Ms. Dortch:

Yesterday, E. Shakin and D. May of Verizon participated in a conference call with C. Libertelli of Chairman Powell's office. The purpose of the meeting was to reiterate Verizon's position in the above captioned proceedings. The attached material was used during the meeting.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz".

Attachment

cc: J. Goldstein



Section 272 Forbearance & Operating, Installation & Maintenance Obligations

Separate Affiliate Requirement/Nondominance

- No basis to extend the 3-year sunset of the section 272 restrictions
- The Act sunsets the section 272 affiliate requirements by BOC, not by state
- BOC long distance services should remain nondominant regardless of whether the BOC integrates long distance services after sunset
- At a minimum, BOC long distance service should remain nondominant in any state where the BOC meets the same safeguards as independent LECs under section 64.1903, including any changes as a result of the pending rulemaking.

Forbearance from OI&M Restriction

Docket CC 96-149

- The OI&M restriction is not mentioned anywhere in the Act. The Commission created it when it adopted rules to implement the “operate independently” provision in section 272(b)(1).
- When the Commission adopted the OI&M restriction, it did not have a record to conduct a cost-benefit analysis of using structural separation as opposed to accounting safeguards.
- Verizon’s has several years of experience with section 272 affiliates and its analysis shows that the OI&M restriction is the major factor in the additional costs caused by the 272 separate affiliate rules. The prohibition:
 - imposes duplicative costs on Verizon’s affiliates by requiring them to hire additional personnel to do provisioning and maintenance work that could be done more efficiently by sharing personnel with the BOC
 - requires the affiliate to develop and operate its own operating support systems when the BOCs’ OSSs could perform the same tasks with little modification
 - requires the separate affiliate to develop redundant network operating control systems and back office provisioning functions

Forbearance from OI&M Restriction Docket CC 96-149

- Verizon's analysis shows that the costs of complying with the OI&M restriction far outweigh any previously perceived benefits.
 - Verizon has incurred approximately \$197 million from 1998 through 2002 to comply with the OI&M restriction, and that it expects to incur an additional \$298 million from 2003 through 2006 to comply with this restriction, for a total of \$495 million.
 - Verizon could not eliminate all sunk investments if the OI&M restriction were eliminated today, but it could achieve about \$183 million in incremental savings from 2003 through 2006.

Forbearance from OI&M Restriction

Docket CC 96-149

- There is no regulatory need for the restriction. BOCs and their section 272 affiliates should be allowed to share OI&M services just as they are permitted to share administrative and other services.
 - There is no fundamental difference between the cost allocations necessary to monitor the sharing of OI&M and services such as finance, human resources, legal and accounting.
 - Positive time reporting can be used as it is used today for nonregulated services such as inside wiring maintenance.
 - Cross-subsidization is not a realistic danger for carriers such as the BOCs who are subject to price-based regulation.
 - Elimination of sharing and adoption of CALLS, which eliminated the need for cost supported SLC and which reduces the X factor to the GDPPI when the average traffic sensitive rate hits the target (which it has in Verizon East and in all but a few study areas in Verizon West) are changed circumstances which avoid the cross-subsidization concerns that the Commission cited in adopting the OI&M restriction.

Forbearance from OI&M Restriction

Docket CC 96-149

- Because of the OI&M restriction, BOCs cannot provide seamless end-to-end services to their customers placing them at a competitive disadvantage, particularly with respect to the large business customers.
 - Problems are exacerbated in the relatively nascent broadband market.
- Verizon has met the standards for forbearance:
 - Enforcement of the OI&M restriction is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.
 - Enforcement of the OI&M restriction is not necessary for the protection of consumers.
 - Forbearance from applying the OI&M restriction is consistent with the public interest.



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April 17, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Section 53.203(a)(2) of the Commissions Rules, CC Docket No. 96-149

Dear Ms. Dortch:

Yesterday, D. May, G. Asch, G. Cooke and J. Di Bella of Verizon met with M. Carey, R. Tanner and B. Dever of the Wireline Competition Bureau to regarding the above proceeding. Specifically discussed were the Declaration of Fred Howard in Verizon's Petition for Forbearance filed on August 5, 2002 and Attachment A to Verizon's Reply Comments filed September 24, 2002. Also, the attachment was provided to staff today.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz".

Attachment

cc: M. Carey
R. Tanner
B. Dever

April 17, 2003

**Verizon Petition for Forbearance from Applying
Section 53.203(a)(2) of the Commission's Rules,
CC Docket No. 96-149**

**The Limitation in Section 10(d) Does Not Prevent the Commission
from Forbearing from Applying the OI&M Regulations**

Verizon has petitioned the Commission to forbear from applying the restrictions in section 53.203(a) of its regulations to Verizon with regard to the sharing of operating, installation and maintenance ("OI&M") services between its local operating companies and its section 272 long distance affiliates. The Commission has full authority under section 10 of the 1996 Act to grant that petition, and it should do so. Section 10(a) broadly authorizes the Commission to forbear from applying any regulation, and indeed from any provision of the Act itself. Section 10(d) limits the Commission's authority to forbear only with respect to two sections of the Act itself, sections 251(c) and 271. Nothing in section 10(d) prevents the Commission from exercising its forbearance authority with respect to any regulation that the Commission has adopted to implement section 272, or even any of the provisions of section 272 of the Act. Worldcom's contrary suggestion in its opposition to Verizon's forbearance petition has no merit.

1. Section 10(a) of the 1996 Act plainly grants the Commission authorization to forbear from applying any regulation adopted by the Commission, including sections 53.203(a)(2) and (3) of the Commission's rules, 47 C.F.R. §§ 53.203(a)(2) & (3). Section 10 provides the Commission broad forbearance authority with only narrow, specifically defined limitations.¹ Section 10(a) authorizes -- indeed, requires -- the Commission to "forbear from applying *any*

¹ As the legislative history demonstrates, section 10 is intended to "empower[] the FCC to forbear from applying any regulation or provision" of the Act. S. Rep. No. 104-23 (1995), 1995 WL 142161, at *50.

regulation or provision of this Act to a telecommunications carrier or telecommunications service” if the conditions for forbearance are satisfied. 47 U.S.C. § 10(a) (emphasis added). Section 10(d) then carves out a narrow exception that precludes the Commission from forbearing from applying only two specific statutory provisions, sections 251(c) and 271, and even then only “until it determines that those requirements have been fully implemented.” 47 U.S.C. § 160(d).

Verizon has asked the Commission to forbear from applying only one rule among many *regulations* that the Commission adopted under section 272, not to forbear from the application of the statute itself. On its face, section 10(d) does not exclude Commission regulations from the Commission’s authority to forbear. To the contrary, section 10(d)’s exception to the Commission’s forbearance authority is limited to specific statutory provisions. Section 10(a) grants the Commission forbearance authority with respect to “any regulation or any provision of this Act.” *See* 47 U.S.C. § 10(a). Section 10(d) bars forbearance only with respect to “the requirements of sections 251 and 271” themselves. Because of the broad compass of section 10(a) and the specific terms of section 10(d), the exceptions to the Commission’s forbearance authority in section 10(d) should be construed narrowly and confined to the plain language of that provision.

Worldcom has advanced the mistaken contention that section 10(d)’s reference to section 271 incorporates, via section 271(d)(3)(B), a prohibition on forbearance from applying section 272. We discuss below why that argument is not valid. But even if section 10(d) did somehow incorporate a restriction on forbearing from section 272’s provisions, it would at most bar forbearance from applying the “requirements” of section 272 of the statute itself, and would not bar forbearance from applying implementing regulations that are not required by the statute. *See* 47 U.S.C. § 10(d) (barring forbearance with respect only to “the requirements of sections 251

and 271”). And the Commission’s OI&M rules plainly are not compelled or “required” by section 272.

In the first place, nothing in the text of section 272 refers to sharing by a BOC and its affiliate of operating, installation, or maintenance services. Those words do not even appear in the statute. The Commission adopted the OI&M rule pursuant to section 272(b)(1),² which provides that a separate affiliate “shall operate independently from the Bell operating company.” the Commission itself recognized that that requirement is susceptible of a varying interpretations. In adopting the OI&M rules, the Commission noted that section 272(b) does not prohibit the sharing of services between a BOC and a section 272 affiliate.³ If Congress had intended to require the Commission to prohibit the sharing of OI&M services, it would have included such a prohibition in the language of section 272, as it did in section 274(b) for electronic publishing.⁴

Further, in the *Non-Accounting Safeguards Order*, the Commission expressly noted that it could have achieved the purposes of section 272(b)(1) *without* the OI&M rules, and thus that those rules were not required by that section. The Commission was concerned about the perceived risk that allowing the same individuals to perform OI&M functions for both the BOC and the affiliate would present opportunities for improper cost allocation.⁵ But the Commission acknowledged that it could address that concern -- and thus fulfill any 272 concern about sharing

² *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 163 (1996) (“*Non-Accounting Safeguards Order*”).

³ *See id.*, ¶ 168.

⁴ *See* 47 U.S.C. § 274(b)(7)(B).

⁵ *See* 11 FCC Rcd 21905, ¶ 163 (“Regardless of whether the BOC or the section 272 affiliate were to provide such service, we agree with AT&T that allowing the same individuals to perform such core functions on the facilities of both entities would create substantial opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized.”).

of services between a BOC and a section 272 affiliate -- through auditing and monitoring of accounting plans.⁶ The Commission ultimately opted not to pursue that route for OI&M services, not because it deemed that more was required under section 272, but simply because it believed that accounting requirements might be costly alternatives.⁷

The OI&M rules thus were not *required* in 1996 to implement section 272. Rather, they were, in the Commission's view, an expedient means of ensuring that BOCs complied with those requirements while eliminating reporting and monitoring obligations that might otherwise have been necessary.⁸ But an expedient measure is not a statutory requirement -- it is a policy choice. As Verizon demonstrated in its forbearance petition, that policy choice must be revisited, because it has in practice imposed substantially more costs than were anticipated, and experience since that Act has demonstrated the reliance on Commission's accounting rules is a less burdensome alternative that can and does address any concern about the sharing of services between a BOC and a section 272 affiliate. Accordingly, the OI&M rules clearly are *not* an expedient (or a required) means of enforcing section 272.

Finally, as Verizon's petition demonstrates, even if the Commission had concluded that the OI&M rules were required by section 272 in 1996, they are not required today because

⁶ *See id.* ("allowing the sharing of such services would require 'excessive, costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier . . . to audit and monitor the accounting plans necessary for such sharing to take place.'") (*quoting Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies; North American Telephone Association Petition for Declaratory Ruling on the Requirement for Sale of Customer Premises Equipment by the Bell Operating Companies*, 95 FCC 2d 1117, 1144 ¶ 70 (1983)).

⁷ *See id.*

⁸ Indeed, in adopting the OI&M rules, the Commission said that it was "striking an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination." *Id.*, ¶167.

circumstances have changed dramatically. In 1996, the Commission was concerned that BOCs might try to subsidize their long distance operations by shifting their costs to their local operations. But a BOC would do so only if it could recover those costs by raising its rates for other services. In the years after the Commission adopted the OI&M rules, it severed the last remaining links between prices and costs by eliminating sharing from price caps and by adopting the CALLS restructure. In this environment, there is no justification for continuing to use structural safeguards to monitor cost allocations. The affiliate transaction rules are more than sufficient to monitor cost allocations between interexchange and local exchange services, and they have proven effective in every other area where the Commission's rules already allow services to be shared between a BOC and a section 272 affiliate. The Commission also already relies on its cost allocation rules to monitor the provision of nonregulated services such as inside wire, customer premises equipment, and enhanced services. There is no reason to believe that the same type of procedures would not be sufficient for long distance services.

It is clear, then, that the Commission could forbear from enforcing the OI&M rules without forbearing from enforcing section 272's requirements generally or section 272(b)(1) in particular. The OI&M rules go above and beyond anything required by section 272, and the Commission's remaining rules, once the OI&M rules are lifted, will fully ensure that BOCs and their long distance affiliates operate independently, thus ensuring that the Commission forbears neither from section 272 itself, nor from section 271.

2. Even if the OI&M rules were "required" by section 272 (and, as explained above, they are not), section 10(d) cannot reasonably be viewed as prohibiting the Commission from forbearing from the application of section 272. Such a view would require reading section 10(d) to incorporate by reference all of section 272 -- that is, to find that Congress limited the Commission's broad grant of forbearance authority through the back door, in section 271(d)(3), even while Congress declined to adopt any such limitation through the front. Congress plainly

knew how to limit the Commission's authority to forbear, and it plainly chose not to limit it with respect to section 272.

All that section 271(d)(3) requires is that "Commission . . . not approve [an application for section 271 authorization] unless it finds that . . . (B) the requested authorization will be carried out in accordance with the requirements of section 272" Thus, the Commission need find only that the 271 applicant will comply with section 272, as the Commission has found it is appropriate to apply that section. Once that finding is made and the Commission grants a carrier's section 271 application, section 271 is "fully implemented" within the meaning of section 10(d). After that finding is made, the Commission has as much authority to forbear from the requirements of section 272 as it has with regard to other sections of the Act. If the Commission determines that it no longer is necessary to apply some -- or even all -- of the provisions of section 272, it can do so without disturbing the "requirements of section 271" in any way. The Commission's independent decisions regarding whether and to what extent to forbear from enforcing requirements under section 272 would in no way constrain the Commission's prior demonstration of "full implementation" of section 271. Clearly, therefore, section 10(d) is not a barrier to forbearance once the Commission has concluded that a BOC has met the requirements of section 271 even if the Commission were to conclude (incorrectly, we believe) that the section 272 requirements were somehow within the scope of section 10(d).

Moreover, as noted above, the better reading of the Act is that section 10(d) applies only to the unique requirements of section 271 itself, and *not* to the separate requirements of section 272.

The Commission should reject WorldCom's contention that a 1998 decision of the then-Common Carrier Bureau dictates a different conclusion about the meaning and effect of section

271(d)(3)(B). In the *E911 Forbearance Order*,⁹ the Bureau granted the 272 forbearance applications of BellSouth and Verizon for services falling either within section 271(f) (previously authorized services) or section 271(g) (incidental interLATA services). In dictum, the Bureau suggested that it could not forbear from applying section 272 with respect to other interLATA services for which authorization is required under section 271(d)(3) of the Act, noting that section 10(d) “precludes [the Commission’s] forbearance for a designated period from section 272 requirements with regard to any service for which a BOC must obtain prior authorization pursuant to section 271(d)(3).”¹⁰

With deference, Verizon submits that the Bureau’s statements on this issue in the *E911 Forbearance Order* are not controlling on this issue. The Bureau itself offered no reasoned basis for its conclusion at the time, and in no subsequent decision has either the Bureau or the Commission relied on this aspect of the Bureau order. Indeed, the Bureau decision has been overtaken by events; the subsequent decision by the full Commission in the *NDA* proceeding.¹¹ In *NDA*, the Commission concluded that it has authority to forbear from applying section 272 to incidental interLATA services under section 271(g)(4).¹² Like services that must be authorized under section 271(d)(3), services permitted under section 271(g)(4) are expressly subject to section 272. *See* 47 U.S.C. § 272(a)(2)(B)(i). Further, both types of services are equally tied to the grant of section 271 authority: for both, the requirements of section 272 sunset three years

⁹ Memorandum Opinion and Order, *Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communication Act of 1934, as Amended, to Certain Activities*, 13 FCC Rcd 2627 (1998) (“*E911 Forbearance Order*”).

¹⁰ WorldCom Opposition, CC Docket No. 96-149, at 2 (filed Sept. 9, 2002) (*quoting E911 Forbearance Order* at ¶ 23).

¹¹ *Petition of U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, (1999) (“*NDA*”).

¹² *See id.*, ¶¶ 28-56.

after a BOC obtains authorization to provide interLATA telecommunications services in a particular state under section 271(d). *See* 47 U.S.C. § 272(f)(1).

In short, following the *NDA* order, there is no sound analytical basis for concluding that section 272 forbearance is available for section 271(g)(4) services but not for section 271(b)(1) services. Nor is there any sound policy basis for such a distinction; Congress clearly dictated that in the first instance -- absent forbearance -- *both* types of interLATA services should be provided pursuant to the requirements of section 272. If the Commission's forbearance from one does not upset the Congressional scheme under section 271 of the Act, there is no reason that its forbearance as to the other should do so.

Conclusion

) The Commission has broad authority under section 10(a) to forbear from applying any provision of the Act, so long as the conditions for forbearance are satisfied. That authority extends to forbearance of section 272 and, even more certainly, to the OI&M rules that the Commission, in its discretion, adopted in implementing section 272.



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April 30, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Section 53.203(a)(2) of the Commissions Rules, CC Docket No. 96-149

Dear Ms. Dortch:

Yesterday, Dee May, Scott Randolph, Dennis Weller, John Goodman and Ed Shakin of Verizon and Professor Dennis W. Carlton, University of Chicago and Hal S. Sider, Senior Economist and Senior Vice-President of Lexecon, Inc. held meetings with Simon Wilkie of the Office of Strategic Planning and Policy Analysis, Gail Cohen, Michelle Carey, Bill Kehoe, Harry Wingo, Michael Carowitz and Darryl Cooper of the Wireline Competition Bureau, and Barbara Esbin, Alison Greenwald, Eric Bash, Peter Corea, Peggy Greene, John Kiafer and John Norton of the Media Bureau to regarding the above proceeding. The document provided is attached. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz".

Attachment

cc: M. Carey
G. Cohen
B. Kehoe
H. Wingo
M. Carowitz
D. Cooper
B. Esbin
J. Kiafer
E. Bash
P. Corea
S. Wilkie

Overview

- **We evaluate the economic rationale for “common carrier” regulation of broadband services provided by ILECs**
 - Regulations require ILECs to provide wholesale broadband transport services at tariffed, non-discriminatory rates
 - Cable modem firms are not subject to regulation
- **Analysis involves consideration of:**
 - **Market definition**
 - Identify products that are close substitutes in demand/supply
 - Apply *Merger Guidelines* framework
 - **Market power**
 - Virtually all firms exercise *some* market power
 - We ask whether firms have market power in the sense that elimination of regulation would result in higher prices
- **Conclusion:**
 - Elimination of common carrier regulation will benefit consumers

Broadband markets

- **Mass market broadband services include:**
 - ADSL
 - Cable modem services
 - Satellite / fixed wireless
 - New Technologies - Broadband Over Power Line (BPL)

- **Larger business broadband services include:**
 - Frame Relay
 - ATM
 - Gig E / Ethernet
 - New Technologies

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Elimination of common carrier obligation promotes consumers welfare

- **Encourages more rapid deployment**
- **Encourages continued investment in emerging technology**
- **Allows the market to determine:**
 - Best course for technological development
 - Most efficient business arrangements
 - Content to satisfy consumer demand

Elimination of common carrier obligations would not be expected to result in higher prices for mass market broadband services

- Cable modem services account for 65 percent of mass market broadband services; ADSL accounts for 31 percent
- Cable modem services available to 84 percent of homes; ADSL available to 61 percent
- Satellite services widely available, new wireless technologies becoming available (wi-fi, 3G)
- “Broadband Over Powerline has the potential to provide consumers with a ubiquitous third broadband pipe to the home.” Chairman Powell, April 23, 2003
- Firms can readily expand capacity
- Independent ISPs buy less than 25 percent of Verizon-provided ADSL lines
- Therefore the elimination of common carrier rules would not be expected to affect average prices

LEXECON

It is a misconception that ILECs are monopoly suppliers of wholesale transport services to independent ISPs

- Broadband Internet services includes (i) broadband transport; (ii) ISP functions
- ILECs provide broadband transport to independent ISPs on a wholesale basis subject to common carrier regulations; cable firms have begun to do so on a private contract basis
- However, this does not imply that wholesale transport services provided to independent ISP is a market or that ILECs are “monopolists” in providing transport services to independent ISPs
 - Transport services provided by ILECs compete with those provided by cable modem firms and others, which must be included in market definition
 - Elimination of common carrier regulation would not be expected to result in higher prices even if ILECs bundled ISP and transport services

In the absence of regulation, efficiency considerations dictate the services to which ILECs offer wholesale transport to independent ISPs

- ILECs will have the incentive to enter into commercial arrangements with independent ISPs and other content providers that are efficient or offer unique content
- Provision of wholesale services to efficient ISPs would enable ILECs to provide broadband transport to customers that otherwise might be served by cable modem firms or other rivals

Elimination of common carrier obligations would not be expected to result in higher prices for larger business broadband services

- ILECs face competition from IXC's in the provision of frame relay and ATM services
- Competitors can readily expand capacity
- Customers are sophisticated